access to serve customers of all shapes and sizes, and in all geographic markets, which demonstrates that special access is a viable alternative for competing providers wherever there is demand for high-capacity services. Competing carriers as a whole are using special access far more extensively than they are using UNEs, and the same is true of many individual carriers, including both larger carriers such as **[BEGIN CLEC PROPRIETARY] [END CLEC PROPRIETARY]**, as well as smaller carriers such as **[BEGIN CLEC PROPRIETARY] [END CLEC PROPRIETARY]**.

a. According to the most recent data available, more than 80 percent of Verizon's total special access revenues are generated from sales to other carriers, which then use the special access circuits to provide service to their own retail customers. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 51; Nogay Decl. ¶ 23. Competing carriers are using special access services in three main respects: to extend the reach of their own fiber networks or those of other alternative providers they may be using; by reselling special access services directly to end users; or to transport switched traffic that is consolidated from many smaller customers.

Some carriers use special access services exclusively (rather than UNEs) to reach their customers, or have stated that special access is all they need from ILECs. For example, Time Warner Telecom recently announced that it "does not rely upon UNEs," because it earns the "majority of our revenue . . . exclusively through our own network facilities," and "instances where we need services from ILECs to connect our remote customers to our vast fiber network,

we purchase those under special access tariffs or under agreements with the ILECs."[50] US LEC is "successfully executing its business plan and, importantly . . . [is] well positioned to address the uncertainty around UNE services," because "over 90% of [its] customer T-1s are not UNE based."[51] Pac-West has reassured investors that it "anticipates no direct impact from [the] recent FCC Triennial Review actions" because "Pac-West does not employ UNEs in its current network architecture in any significant way."[52] These statements confirm what ALTS has reported: "CLECs that rely primarily on old-fashioned special access (instead of unbundled network elements) have logged impressive growth."[53]

Given that Verizon provides special access services to other carriers, it is able to determine where it is providing that service, and to which end-user locations. In each of the top-40 MSAs it studied, Verizon reviewed the billing records of a sample of carriers that included the three largest and three to six smaller competing providers that purchase high-capacity special access services from Verizon to identify the type of service they obtained, the location at which it was being used, and the identity of the customer that was being served. *See* Verses/Lataille/Jordan/Reney Decl. ¶¶ 46-48. These data show that competing providers are

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[50] Time Warner Telecom Press Release, *Time Warner Telecom Not Impacted by UNE Ruling* (June 10, 2004) (quoting Paul Jones, Senior Vice President – General Counsel and Regulatory Policy, Time Warner Telecom).

[51] US LEC Corp. Press Release, *Revenue Grows by $13.3 Million and EBITDA Grows by $3.3 Million Year Over Year* (July 29, 2004).

[52] Pac-West Telecomm, Inc. Press Release, *Pac-West Telecomm Anticipates No Direct Impact from FCC Triennial Review Actions* (June 10, 2004); *see also* Ex Parte Letter from R. Rindler, Counsel for Pac-West, to Marlene Dortch, FCC, at 2, CC Docket Nos. 01-338, *et al.* (Sept. 7, 2004) ("Pac-West serves all customers via facilities obtained from other carriers, with much of that being obtained from the ILECs.").

[53] ALTS, *The State of Local Competition 2003*, at 5 (Apr. 2003), *available at* http://www.alts.org/Filings/2003AnnualReport.pdf.

using special access services purchased from Verizon to serve customers of all types and sizes, and in all geographic areas where there is high-capacity demand, which demonstrates that special access is a viable alternative for competing providers.

Maps E show the locations where these representative carriers are using Verizon special access to serve customers in the metropolitan areas of each of Verizon's top-20 MSAs. *See id.* ¶ 30.[54] Maps D provide a more detailed view of these data, focusing on the downtown areas, for each of Verizon's top-40 MSAs. *See id.* Both sets of maps also overlay the locations where competing carriers are purchasing special access with the locations of the buildings that competing providers are serving with fiber. These maps demonstrate that competing providers are using Verizon special access to serve customers in areas of high concentration, where competitive facilities already exist, as well as in areas where demand is less concentrated and competitive facilities have not yet been deployed. The fact that competing carriers are using special access in both circumstances proves that special access enables competing carriers to compete not only against Verizon but also against other facilities-based carriers. Moreover, because the tariffed rates and applicable discounts for special access are uniform throughout an MSA, competing carriers have the same ability to compete against both Verizon and other facilities-based carriers in areas where demand is less concentrated as they do in areas of high concentration.

Exhibits 8A-8E to the Verses/Lataille/Jordan/Reney Declaration is a list of the types of customers that the sample competitors are serving using special access services purchased from

[54] With respect to the second 20 MSAs, Verizon did not prepare a separate set of maps that depicted just the locations being served with special access in the larger metropolitan areas (*i.e.* Maps E), but instead combined this data on the same map with lit-building data (*i.e.* Maps D).

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Verizon. The list shows that competing providers are using special access to serve not only large enterprises, but also small businesses such as antique dealers, book stores, dry cleaners, florists, gas stations, and hair dressers, to name a few. These data therefore demonstrate that special access is a viable competitive alternative for all kinds of customers that demand high-capacity services.

The data also demonstrate that competing carriers of all varieties are using special access — both smaller carriers such as **[BEGIN CLEC PROPRIETARY]**

[END CLEC PROPRIETARY], as well as larger carriers such as **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]**. *See* Nogay Decl. ¶ 20 & Verses, *et al.* Exhs. 7A-B. To provide just a couple examples, **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]** relies exclusively on special access to compete for customers of various types and sizes (*e.g.*, hospitals, universities, financial institutions, and government agencies) in Verizon's serving territory in the Northeast. *See* Nogay ¶ 21. In the past 18 months, **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]** has nearly doubled the number of DS1 circuits it obtains from Verizon as special access — from **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]**. *See id.* Likewise, on the West Coast, Telepacific has taken a similar approach in seven markets in California and Nevada, and in the past 18 months it has more than **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]** the number of DS1 special access circuits it obtains from Verizon — from **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]**. *See*

id. ¶ 22. Verizon's data confirm that this CLEC serves small and medium business customers. *See id.* ¶ 23.

b. Verizon's data also show that competing carriers are using high-capacity special access services much more extensively than UNEs. Of the high-capacity loops that competing carriers purchase from Verizon, nearly 93 percent of the DS1 loops and more than 98 percent of the DS3 loops are purchased as special access service. *See* Verses/Lataille/Jordan/Reney Decl. ¶¶ 52-53 & Exh. 10. Put another way, only 7 percent of the DS1 loops and less than 2 percent of the DS3 loops are purchased as UNEs. *See id.* Verizon's data also show 94 percent of the DS1 loop and transport combinations that competing carriers purchase from Verizon are purchased as special access rather than as UNEs. *See id.* ¶ 58.[55]

Verizon's data also show that there is very little total demand for Verizon's facilities at the DS3 level and higher. Competing carriers are purchasing a total of only 37,000 DS3 circuits as special access and UNEs combined from Verizon, *see* Verses/Lataille/Jordan/Reney Decl., Exhs. 12 & 13. Competing carriers are purchasing a total of only 1,500 DS3 loops as UNEs from Verizon, BellSouth, and SBC *combined*. *See 2004 Fact Report* at III-39. This demonstrates that competing carriers are relying instead on facilities they have deployed themselves or have obtained from alternative providers.

Despite what some competing carriers have claimed, it is not merely the large CLECs with significant interexchange operations or the wireless carriers that are relying predominantly on special access as opposed to UNEs. Indeed, even when the three traditional IXCs (*i.e.*, AT&T, MCI, and Sprint) are removed from the analysis, the data show that 90 percent of the

[55] The same is true outside Verizon's region. In both SBC's and BellSouth's region, competing carriers are purchasing 97 percent of DS3 circuits as special access as opposed to UNEs. *See 2004 Fact Report* at III-39.

DS1 loops, 95.5 percent of the DS3 loops, and 91 percent of the DS1 loop/transport combinations that competing carriers purchase from Verizon are purchased as special access rather than as UNEs. *See* Verses/Lataille/Jordan/Reney Decl., Exh. 10. Moreover, AT&T and CompTel have previously admitted that interexchange carriers use special access to provide local services as well as long-distance,[56] which refutes claims that special access is a viable alternative for long-distance service, but not for local services.

Removing wireless carriers from the analysis yields similar results. When wireless carriers are removed together with the three incumbent IXCs, the data show that more than 90 percent of the DS1 loops and more than 97 percent of the DS3 loops that competing carriers purchase from Verizon are purchased as special access rather than as UNEs. *See* Verses/Lataille/Jordan/Reney Decl., Exh. 10.

An analysis of individual CLECs also confirms that many competing carriers – of different sizes – are providing high-capacity services using special access rather than UNEs. Verizon has analyzed the high-capacity facilities that nearly 30 individual CLECs purchase from Verizon. Of these, at least 17 CLECs purchase more than 90 percent of their DS1 loops and DS1 loop/transport combinations as special access rather than as UNEs. *See id.* These same 17 CLECs purchase more than 99 percent of their DS3 loops as special access rather than as UNEs. *See id.* Smaller CLECs that rely primarily or entirely on special access include: **[BEGIN CLEC**

[56] *See, e.g.*, AT&T Petition for Rulemaking at 14-15, CC Docket No. 01-338, *et al.* (FCC filed Oct. 16, 2002) ("IXCs and competitive carriers must rely on Bell special access in order to provide both exchange access *and* local service."); Comments of the Competitive Telecommunications Association at i, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (FCC filed Apr. 5, 2001) ("Requesting carriers, including those that carry a 'significant amount of local exchange traffic,' have been forced to order EEL-equivalent services (*e.g.*, T1 loops, multiplexing and transport) out of the ILECs' tariffs as higher-priced special access services.").

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[END CLEC PROPRIETARY]. *See id.* For example, **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]** purchases a total of 12,033 DS1 special access circuits from Verizon in 38 different MSAs, and a total of 25 DS3 special access circuits in 10 different MSAs, and does not purchase any DS1s or DS3s as UNEs. *See id.* **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]** purchases a total of 4,641 DS1 special access circuits from Verizon in 20 different MSAs, and a total of 15 DS3 special access circuits in five different MSAs, and likewise does not purchase any DS1s or DS3s as UNEs. *See id.*

In sum, although some individual carriers have claimed that they need access to high-capacity UNEs, the evidence shows that competing carriers *as a whole* clearly do not. As demonstrated above, Verizon's data show that a number of competing carriers are using a combination of their own or alternative facilities plus special access to compete in markets throughout the country, including the very same market segments as the carriers that contend they need access to high-capacity UNEs. As the Commission has held, anecdotal claims by individual CLECs that they are having difficulty competing are entitled to little weight where, as here, there is evidence that competing carriers as a whole are thriving.[57] The Commission has also recognized that, where individual CLECs attempt to blame the ILEC for their difficulties in the market, those claims may be refuted by evidence that other CLECs that rely on the ILEC in

[57] *See, e.g.*, Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 50 (1999) ("*New York 271 Order*") (holding that "[m]ere unsupported evidence," such as "anecdotal evidence" from a single CLEC, "will not suffice" to rebut a showing based on "objective" data regarding competing carriers as a whole), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

the same manner are succeeding.[58] Applying these principles here, the balance of the evidence clearly shows that both competing carriers as a whole, as well as many individual carriers, are competing successfully using a combination of their own or alternative facilities plus special access.

c. The evidence shows that special access is competitively priced and that CLECs have been successfully competing for all kinds of customers using special access service that they purchase at deep discounts off the tariffed "base" rates for these services. Verizon offers significant discounts off of those base rates — on the order of 5 to 40 percent — to customers that enter into volume and/or term commitments (ranging from 1 to 7 years, depending on the service and geographic area). *See* Verses/Lataille/Jordan/Reney Decl. ¶ 60. Verizon's data show that competing carriers are availing themselves of these discounted rates. On the whole, wholesale customers are purchasing special access services from Verizon at discounts that typically are approximately 35 to 40 percent off the base rates for these services. *See id.*

The fact that competing carriers typically purchase special access service at deep discounts, or at a minimum have the opportunity to do so, renders meaningless the claim that the tariffed rates for special access service have increased since ILECs were granted pricing flexibility. In any event, the ARMIS data reported to the Commission show that the average revenue per special access line sold by the Bell companies has in fact *declined* during the period of pricing flexibility, and that Verizon's prices have declined even faster than BOC prices as a

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[58] *See, e.g.*, Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, ¶ 49 (2001) ("*Pennsylvania 271 Order*") (in evaluating ability of competing carriers as a whole to compete, finding persuasive evidence that "some competing carriers in Pennsylvania attain much higher flow-through rates than others"), *aff'd, Z-Tel Communications, Inc. v. FCC*, 333 F.3d 262 (D.C. Cir. 2003).

whole. *See* Declaration of Dr. William E. Taylor Regarding Special Access Pricing ¶¶ 7-9 (Attachment G) ("Taylor Special Access Pricing Decl."). In addition, Verizon has analyzed the average revenues it earns per DS1 special access line, which shows that the price customers have paid for Verizon's special access on a per-line basis has decreased since 2001. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 61 & Exh. 15.

Moreover, while competing carriers have claimed that prices have increased in the specific areas in which the Commission has granted ILECs special access pricing flexibility, the prices that carriers have actually paid for special access have dropped faster during the pricing flexibility period than before. *See* Taylor Special Access Pricing Decl. ¶ 11. Verizon's own specific experience is consistent with these data. In areas where Verizon has obtained pricing flexibility, it has been able to offer, and carriers have been able to negotiate, even further discounts off of Verizon's standard tariff rates. *See* Nogay Decl. ¶ 34; Declaration of Eric J. Bruno ¶¶ 26-29 ("Bruno Decl.") (Attachment D).

Although competing carriers have attempted to prove that, while special access prices have declined BOC margins have nonetheless increased, such claims improperly rely on ARMIS for their measure of profits. As the Commission has recognized, ARMIS data "do[] not serve a ratemaking purpose."[59] ARMIS data are collected pursuant to cost-allocation rules that the Commission more than three years ago found were "outdated regulatory mechanisms that are out of step with today's rapidly-evolving telecommunications marketplace," and that are even more antiquated today.[60] For example, although the Commission's accounting rules group revenues

[59] Order on Reconsideration, *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2637, ¶ 199 (1991).

[60] Report and Order, *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 16 FCC Rcd 11382, ¶ 1 (2001).

associated with DSL services and other interstate packet-switched services together with traditional special access services, they assign a significant portion of the underlying costs associated with those services to other categories.[61]

Finally, all competing carriers are now able to obtain the maximum discounts contained under Verizon's tariffs by purchasing service from one of the several aggregators that assist CLECs to obtain access to each other's networks, and to aggregate their demand in order to obtain access to ILEC special access at substantial discounts.

For example, Global Internetworking has recently announced its new "Unbundled Network Element Replacement" service that provides competitive carriers "timely solutions from a single provider, eliminating the hassle of finding multiple alternative providers, making volume purchase commitments, negotiating multiple agreements and dealing with the provisioning groups of numerous other carriers."[62] The company reports it has "long-term wholesale relationships" with "1,300 facilities-based carriers" providing "*access to over 535,000 lit buildings*" as well as "IXC POPs, and collocation facilities" in "every 1st, 2nd and 3rd tier market in the U.S."[63] Global Internetworking already "receives and fulfills thousands of requests

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[61] *See* Declaration of Alfred E. Kahn & William E. Taylor at 7-9, *attached to* Opposition of Verizon, *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access*, RM-10593 (FCC filed Dec. 2, 2002).

[62] Global Internetworking, Inc. Press Release, *Global Internetworking Launches UNE Replacement (UNE-R) Service, Solution Helps Telcos Find Cost Effective UNE Loop and Transport Alternatives* (Sept. 13, 2004).

[63] Global Internetworking, Inc., *About Us: Company Overview* (emphasis added), *available at* http://www.globalinternetworking.com/home/index.php?pg=about; Global Internetworking, Inc., *About Us: Why Global Internetworking?*, *available at* http://www.globalinternetworking.com/home/index.php?pg=about&sec=why&reason5=true; Global Internetworking, Inc., *Agents/Partners*, *available at* http://www.globalinternetworking.com/home/index.php?pg=agents.

for high-capacity data transport services in every market in the U.S."[64] It boasts that its "wholesale purchasing expertise can allow us to offer loops and transport to Verizon served locations at 10%-20% below the comparable Verizon special access tariff rate," and that "in metro markets such as DC, Philadelphia, Boston, and New York, UNE-R discounts may be as high as 50%."[65]

Other competing carriers also act as aggregators of high-capacity facilities. For example, when Verizon operates out of region, competing carriers fulfill Verizon's needs for high-capacity facilities in some markets by aggregating together the facilities of multiple carriers. *See* Cuddy Decl. ¶ 16. As noted above, Paetec has begun using special access to offer wholesale services to other competing providers, often at substantial discounts from what Verizon offers its retail customers.

D. Although the Commission Should Eliminate Unbundling for All High-Capacity Facilities, It Must at a Minimum Eliminate Unbundling for Certain Customers, Services, Facilities, and Market Segments for Which Competition Is Particularly Intense

As demonstrated above, the Commission should eliminate unbundling of all high-capacity facilities in all markets. This is the approach that best squares with *USTA II* and the market facts, and that is most likely to further the Act's goals of promoting facilities-based competition. At a minimum, however, the Commission must eliminate unbundling for certain

[64] Global Internetworking, Inc., *Services*, *available at* http://www.globalinternetworking.com/home/index.php?pg=services.

[65] Global Internetworking, Inc., *News/Press Kit: BUSINESS WIRE – September 13, 2004 – Global Internetworking Launches UNE Replacement (UNE-R) Service, Solution Helps Telcos Find Cost Effective UNE Loop and Transport Alternatives*, *available at* http://www.globalinternetworking.com/home/index.php?pg=news.

customers, services, facilities, and market segments for which competition is particularly intense, and for which there also can be no finding of impairment.

In *USTA II*, the D.C. Circuit reaffirmed its previous holding that the impairment inquiry must take a "nuanced" approach that analyzes whether competition is impaired in "specific markets or market categories." 359 F.3d at 574 (citing *USTA I*, 290 F.3d at 426). Accordingly, the Commission may not impose an unbundling obligation for a particular category of customers, services, or market segments without first making an impairment finding with respect to that category. The D.C. Circuit has in fact twice affirmed the Commission's own conclusion that the standards in the Act are appropriately applied by "disaggregating the *impairment* issue, and in ordering unbundling only with respect to the *service* for which it found impairment." *Id.* at 592 (second emphasis added); *see also id.* ("service-by-service impairment analysis permissible") (citing *CompTel*, 309 F.3d at 12-13). By contrast, where the Commission has "failed to conduct the requisite impairment analysis," for specific categories of services, customers, or market segments the court has reversed its determination. *Id.* at 575 (reversing unbundling requirements for use by providers of wireless service). The D.C. Circuit has squarely held that "competitors cannot generally be said to be impaired" in a particular market category or categories "where robust competition in the relevant market belies any suggestion that the lack of unbundling makes entry uneconomic." *Id.* at 592; *accord id.* at 576. And as demonstrated below, there are a number of categories of services, customers, and market segments where robust competition demonstrates that competing providers are not impaired without access to UNEs.

1. *First*, the Commission must eliminate unbundling of all high-capacity loops and transport for large enterprise customers, wireless and long-distance carriers, EELs, packet-

switched services, and entrance facilities. As described below, there is intense competition in each of these market segments.

a. Large Enterprise Customers

Large Enterprise Customers Generally. Analysts typically define "large enterprise" customers as Fortune 1000 companies and large public institutions.[66] Verizon uses the same definition within its Enterprise Solutions Group. *See* Bruno Decl. ¶ 3. This is the most valuable segment of the telecom industry, representing $50 billion in annual revenues according to some estimates.[67] Large enterprise customers are major purchasers of high-capacity services. In Verizon's region, large enterprise customers account for more than 85 percent of total special access revenues purchased by end-user business customers. *See* Bruno Decl. ¶ 6.

Large enterprise customers often purchase most of their telecommunications services on a nationwide or global basis from a small number of primary service providers — in some cases, just one or two. *See id.* ¶ 8. Traditionally, local telephone companies have not been major players in this market segment, because they did not have the ability to meet all of the needs of these customers. In particular, the interLATA restriction historically precluded the Bell companies from providing interLATA services, which is a critical component of the package of services that large enterprise customers demand. The Bell companies have only recently begun to compete seriously for the nationwide and global business of large enterprise customers.

Today, competing providers lead in the head-to-head competition for this customer segment. According to analysts, AT&T, MCI, and Sprint account for more than half of all

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[66] *See, e.g.*, R. D. Lynch, *et al.*, Lehman Brothers, *Enterprise Telecom Services* at 3 (Nov. 11, 2003) ("*Lehman Enterprise Report*"); *2004 Fact Report* at III-34.

[67] *See Lehman Enterprise Report* at 3; Bruno Decl. ¶ 5; *2004 Fact Report* at III-32.

revenues from large enterprise customers,[68] and are the "primary" service provider for nearly three-quarters of large corporate accounts.[69] As discussed below, these carriers also dominate the provision of Frame Relay and ATM services, which are one of the principal services used by large enterprise customers. There are also a number of other larger carriers that compete in the large enterprise market — such as Level 3 and Qwest — as well as smaller carriers such as XO. *See 2004 Fact Report* at III-33. And major cable companies, such as Time Warner Telecom, Cox, and Cablevision Lightpath, have begun aggressively targeting these customers as well. *See id.* at III-36 to III-37 & Table 19.

Competing carriers are using their own facilities extensively to serve large enterprise customers. AT&T tells investors that its own network "touches virtually all Fortune 1,000 Companies," and that its core network extends "all the way to the customer premises."[70] Royce Holland, the CEO of Allegiance, has stated that "[t]he large corporate enterprise market . . . is all but irrelevant in the debate over competition policy because *there are no bottleneck facilities*."[71] The Commission itself has found that large enterprise customers "provide a large incentive to suppliers to build their own facilities where possible, and carry these customers' traffic over their

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[68] *See* J. Bazinet, *et al.*, JP Morgan, *MCI Inc. – Initiating Coverage with Overweight* at 4 (Sept. 20, 2004) (The large enterprise market is characterized by "[t]wo carriers [AT&T and MCI] with 50% of market."); *Lehman Enterprise Report* at 15; *id.* at 3 (large enterprise market is "[d]ominated by AT&T, MCI, [and] Sprint").

[69] A. Quinton, *et al.*, Merrill Lynch, *The Telecommunicator — WorldCom Survey Results — Industry Implications of Current Customer Thinking* at 2-3 (Feb. 6, 2003); *see 2004 Fact Report* at III-34.

[70] David Dorman, Chairman and CEO, AT&T, Presentation before the Credit Suisse First Boston, Media and Telecom Week at 6 (Dec. 11, 2003); AT&T News Release, *AT&T Introduces New Business Local Access Offer for Large Companies, Government Agencies* (Apr. 16, 2003), *available at* http://www.att.com/news/item/0%2C1847%2C11577%2C00.html.

[71] *Allegiance CEO Urges Regulators to "Stay the Course" on Competition*, TR Daily (Dec. 4, 2003) (emphasis added).

own networks." *Triennial Review Order* ¶ 129. Moreover, because large enterprise customers typically buy services in bulk for facilities located across the country, they get the benefits of head-to-head competitive pricing regardless of whether there are alternative facilities serving any individual location. Verizon's specific experience provides further confirmation of the intense competition in the provision of high-capacity services to enterprise customers. First, since the beginning of 2003, Verizon has responded to at least 302 Request for Proposals ("RFPs") from large enterprises, and in each case was one of *at least five* carriers submitting a response. *See* Bruno Decl. ¶ 20. Of the 203 RFPs for which final selections have been made to Verizon's knowledge, Verizon was selected as one of the carriers only a third of the time, and even in those cases Verizon was not selected to provide all of the services the customer desired. *See id.* Ironically, in many instances competing carriers that won out over Verizon are using special access services purchased from Verizon, which they are able to purchase at steep wholesale discounts. *See id.* ¶ 24. Indeed, in some cases competing carriers are able to offer lower prices to enterprise customers using Verizon special access than Verizon itself is able to offer these same customers, due to Verizon's lack of full pricing flexibility in some markets. *See id.* ¶¶ 23-24. Second, Verizon studied the spending of 24 of its 80 largest customers in the New York City metropolitan area, and found that these carriers spent less than 9 percent of their total telecommunications budgets with Verizon ($361 million out of $4.1 billion). *See* Bruno Decl. ¶ 19. This experience accordingly confirms that there is intense competition for enterprise customers.

Packet-Switched Broadband Services. Just as competing providers dominate the provision of services to large enterprise customers generally, they are also the leading providers of high-speed packet-switched services that make up much of the demand of enterprise

customers. *See 2004 Fact Report* at III-33.[72] Competing carriers do not need to purchase high-capacity transmission facilities as UNEs to provide high-speed packet-switched services, such as Frame Relay and ATM, but instead provide these services by combining their own packet-switching capabilities with high-capacity transmission facilities that either they supply themselves, obtain from an alternative supplier, or purchase as special access service from an incumbent LEC.[73] AT&T, MCI, and Sprint control approximately *three quarters* of the market for Frame Relay and ATM services.[74] These three major carriers are also the major providers of other specialized high-speed data services provided to business customers, such as IP Virtual Private Network ("IP-VPN") services.[75] Many other CLECs also provide ATM, Frame Relay, and IP-VPN services. *See 2004 Fact Report* at III-33. Accordingly, there is no possible justification for requiring high-capacity transmission facilities to be unbundled to provide packet-switched broadband services such as ATM and Frame Relay to enterprise or other customers.

b. Wireless and Long Distance

Both wireless providers and long-distance carriers use high-capacity services extensively to transport traffic within their networks, to connect their networks to other carriers, and, in the

[72] *See also* M. Bowen, *et al.*, Schwab SoundView Capital Markets, *AT&T Corp.* at 2 (Jan. 21, 2004) ("*Schwab AT&T Report*") ("ATM and frame relay services constitute the majority of telecom spending by businesses.").

[73] *See, e.g.*, J. Hodulik, *et al.*, UBS Investment Research, *Paying to Play: How Access Charges Determine Winners and Losers in Telecom Service* at 21 (Apr. 2, 2004) (explaining that IXCs "integrate[]" ILEC special access circuits into their "data service offering[s] for business customers").

[74] *See Schwab AT&T Report* at 3.

[75] *See* H. Goldberg, In-Stat/MDR, *VPNs Take a New Look: Trends in the US IP VPN Services Market* at 16, Table 5 (Jan. 2004) (the five largest providers of IP-VPN service are AT&T, MCI, SAVVIS, Level 3, and Sprint; the only two BOCs in the Top 10 are Qwest and SBC, with a combined market share of only 3.4 percent).

case of long-distance carriers, to provide high-speed connections directly to large end users. Competition for both wireless and long-distance services has thrived, even though providers of these services have not relied on UNEs. *See 2004 Fact Report* at III-29 to III-30.

Wireless. Prior to the *Triennial Review Order*, wireless carriers did not use UNEs at all, *see USTA II*, 359 F.3d at 575; they instead obtained transport facilities from alternative suppliers or purchased tariffed special access services from ILECs.[76] The D.C. Circuit overturned the Commission's decision permitting wireless carriers to obtain UNEs for the first time for failing to undertake the requisite service-by-service impairment analysis. *See USTA II*, 359 F.3d at 575-77. The court found that wireless carriers had not been impaired without access to UNEs in the past in light of the fact that there was a "rapidly expanding and prosperous market for wireless service." *Id.* at 576. The court held that this evidence "clearly show[s] that wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic," and that there was accordingly no basis to find impairment. *Id.* at 575.

As discussed more fully in Section III.B.3 below, since the *Triennial Review* proceeding, the use of wireless services has continued to expand. *See also 2004 Fact Report* at II-27 to II-31. The number of wireless subscribers has grown from 129 million to 161 million,[77] while wireless

[76] *See, e.g.*, Comments of AT&T Wireless, *Notice, Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, NTIA Docket No. 011109273-1273-01 (NTIA filed Dec. 19, 2001) ("[W]ireless carriers expend significant sums to lease transport facilities from incumbent LEC special access tariffs.").

[77] *Compare* Ninth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 04-111, FCC 04-216, ¶ 5 (rel. Sept. 28, 2004) ("*Ninth CMRS Report*") *with Triennial Review Order* ¶ 53 (129 million wireless subscribers in mid-2002).

traffic has grown from 20 percent to 30 percent of all voice traffic.[78] Wireless also competes directly with wireline, both for lines and minutes: the percentage of users giving up their landline phone has grown from 3-5 percent to 7-8 percent and at least 14 percent of voice subscribers use their wireless as their primary line;[79] the number of wireless minutes has grown by 35-70 percent while wireline minutes have declined by 4-7 percent;[80] and wireless now accounts for approximately 43 percent of all long-distance traffic.[81] *See also 2004 Fact Report*

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[78] *Compare* Eighth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 18 FCC Rcd 14783, ¶ 102 (2003) ("One analyst estimates that wireless has now displaced about 30 percent of total wireline minutes.") *with* L.F. Carvalho, Morgan Stanley, Dean Witter, Investext Rpt. No. 8285600, *Wireless Services: Industry Outlook: Life After 50* — Industry Report at *5-*6 (Nov. 28, 2001) (average of 339 monthly MOUs per wireless subscriber in 2001); *Triennial Review Order* ¶ 53 (129 million wireless subscribers in mid-2002); FCC, *Statistics of Communications Common Carriers* at Table 5.8 (2001/2002 ed.) (4.4 trillion Dial Equipment Minutes; "two [dial equipment minutes] are counted for every conversation minute").

[79] *See Triennial Review Order* ¶ 445; *id.* ¶ 230; *The Current State of Competition in the Communications Marketplace: Before the Subcomm. on Telecomms. and the Internet of the House Energy and Commerce Comm.*, 108th Cong. (Feb. 4, 2004) (prepared witness testimony of Adam Quinton, Managing Director & First Vice President, Co-Head, Global Telecom Services Research, Merrill Lynch) ("an estimated 7% of telephone users only have a cell phone"), *available at* http://energycommerce.house.gov/108/Hearings/02042004hearing1164/Quinton1852.htm; *The Current State of Competition in the Communications Marketplace: Before the Subcomm. on Telecomms. and the Internet of the House Energy and Commerce Comm.*, 108th Cong. (Feb. 4, 2004) (prepared witness testimony of Michael Balhoff, Managing Director, Telecommunications Group, Legg Mason) ("[W]hile it is clear that there is substitution whereby wireless-only customers may be 8% of the total consumer market today, it is admittedly difficult to calculate precise figures."), *available at* http://energycommerce.house.gov/108/Hearings/02042004hearing1164/Balhoff1850.htm.

[80] *See* D. Janazzo, *et al.*, Merrill Lynch, *The Next Generation VIII: The Final Frontier?* at 42, Table 33 (Mar. 15, 2004) (between year-end 2002 and year-end 2003, wireless minutes increased by 35 percent, while wireline minutes decreased by four percent; by year-end 2004, wireless minutes will have increased by 70 percent since year-end 2002, while wireline minutes will have decreased by seven percent during the same period).

[81] *See* Yankee Group News Release, *U.S. Consumer Long Distance Calling Is Increasingly Wireless, Says Yankee Group* (Mar. 23, 2004) (estimating that US households make 43 percent of their long-distance calls on wireless phones).

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at II-28 to II-30. Given this extensive competition, there is no basis for imposing an unbundling obligation on high-capacity facilities used to provide wireless services.

For these same reasons, the Commission must deny the petitions for reconsideration filed by a handful of wireless carriers, in which they seek to obtain unbundled access to the link connecting their base stations (or cell sites) with an ILEC central office. *See* AT&T Wireless Recon. Pet., CC Docket Nos. 01-338, *et al.* (FCC filed Oct. 2, 2003) ("AT&T Wireless Recon. Pet."); T-Mobile Recon. Pet., CC Docket Nos. 01-338, *et al.* (FCC filed Oct. 2, 2003) ("T-Mobile Recon. Pet."); Nextel Recon. Pet., CC Docket Nos. 01-338, *et al.* (FCC filed Oct. 2, 2003) ("Nextel Recon. Pet.").[82] As shown above, wireless carriers are not impaired without UNE access to these transport facilities. Indeed, not one of the wireless carriers even asserted in their petitions for reconsideration that they are impaired without UNE access. Moreover, because wireless carriers are not impaired, there can be no claim that CLECs seeking to serve wireless carriers are impaired without UNE access to these facilities. *See, e.g.*, Comments of El Paso Networks, *et al.* at 14-15, CC Docket Nos. 01-338, *et al.* (FCC filed Nov. 6, 2003). As explained above, as long as competition is possible without UNEs — and it is indisputable that wireless carriers can do so — any claim that some other competitors are impaired without UNEs

[82] These carriers also argued — in contradiction to their position during the *Triennial Review* proceeding — that they should be able to obtain UNE access to this link as a local loop, if it is not available as UNE dedicated transport. *See* AT&T Wireless Recon. Pet. at 6, 9; T-Mobile Recon. Pet. at 8; Nextel Recon. Pet. at 8. As the Commission recognized, the last mile in a wireless network is the "wireless local loop" that connects wireless customers to the CMRS carrier's network. *See Triennial Review Order* ¶ 446. This is exactly what the wireless carriers themselves had argued. *See* AT&T Wireless/VoiceStream Petition for Declaratory Ruling at 14, CC Docket No. 96-98 (FCC filed Nov. 19, 2001); Ex Parte Letter from Douglas I. Brandon, AT&T Wireless, to Marlene H. Dortch, FCC, at 2, CC Docket Nos. 01-338, *et al.* (Feb. 5, 2003) ("AT&T Wireless Feb. 5, 2003 Ex Parte"). In contrast, they explained that the connection between the base station and the incumbent's central office (and, from there, to the CMRS provider's switch) is used "for the purposes of *backhauling* traffic." AT&T Wireless Feb. 5, 2003 Ex Parte at 2-3 (emphasis added).

is irrelevant. The purpose of the unbundling requirement is to promote competition, not particular competitors.

Long Distance. As the D.C. Circuit recognized, competing carriers have long provided long-distance service successfully without access to high-capacity UNEs, *e.g.*, *USTA II*, 359 F.3d at 590, and there accordingly is "no evidence suggesting that [CLECs] are impaired with respect to the provision of long distance services," *id.* at 592. On the contrary, the court emphasized that, in the context of long-distance services in particular, "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant market belies any suggestion that the lack of unbundling makes entry uneconomic." *Id.* The D.C. Circuit therefore noted that, on remand, it expected the Commission to "turn to the issue of impairment" specifically "with reference to long distance service," and anticipated that it "may well find none." *Id.*

Since the *Triennial Review* proceeding, competitors have continued to compete successfully in the long-distance market without relying on UNEs, and there is no plausible argument that other carriers are entitled to UNEs to provide long-distance services. AT&T, MCI, and Sprint continue to provide 75 percent of the long-distance services sold to large business customers.[83] In the consumer long-distance market, prices are plummeting and packages of "unlimited" long-distance service are becoming the norm. *See 2004 Fact Report* at II-17 to II-18 & Table 4.[84] Wireless, VoIP, and cable providers have all made extensive inroads

[83] *See* S. Flannery, *et al.*, Morgan Stanley, *Strong Showing for Bells in Annual Corporate Survey* at 32, Exh. 46 (June 22, 2004).

[84] *See also, e.g.*, J. Hodulik, *et al.*, UBS Investment Research, *Sprint Announces Recombination: Putting It Back Together* at 5 (Mar. 1, 2004) ("Competitive pressures in the

into this business, and are now carrying a significant amount of long-distance traffic, typically offering prices at well below those available on conventional wireline networks. *See 2004 Fact Report* at II-17 to II-18 & Table 4, II-32, Table 9, & App. B. In fact, wireless alone now carries more than 40 percent of all long-distance traffic. *See id.* at II-10. Accordingly, there is no basis for imposing an unbundling obligation on high-capacity facilities for use to provide long-distance services.

c. Enhanced Extended Links (EELs)

EELs are simply a combination of high-capacity loops and transport. Thus, EELs are not subject to unbundling for the same reasons as for high-capacity loops and transport generally. In particular, where there are alternative high-capacity loop and transport facilities available, competing providers can use these facilities as a substitute for EELs. Competing carriers also are capable of and are using special access as a substitute for EELs, and the Commission must consider this alternative in its impairment analysis.

The D.C. Circuit held that, with respect to EELs, just as with respect to specific services and markets, the "presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . *precludes* a finding that the CLECs are 'impaired.'" *USTA II*, 359 F.3d at 593 (emphasis added). The court found that where CLECs were competing successfully using special access services purchased from the ILECs,

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long distance market from traditional long distance operators and the Bells has resulted in sharp price declines and diminishing returns."); M. Rollings, *et al.*, Citigroup Smith Barney, *SBC Communications: Analyst Day Affirms Strategy to Trade N/T Margins to Improve L/T Prospects* at 3 (Nov. 13, 2003) ("LD is a commodity service on a stand-alone basis."); J. Bazinet, *et al.*, JP Morgan, *U.S. Telecommunications: The Art of War* at 83 (Nov. 7, 2003) (Consumer stand-alone long-distance voice is likely to "disappear over time as consumers move towards bundled services and long-distance voice becomes more of a vertical feature (often given for free) than a standalone business.").

the Act "precludes" a finding that they would be impaired if they could not "convert" those circuits to UNEs. *Id.* The court also recognized that it would create "anomalies" if CLECs that already were competing successfully using special access were "barred from access to EELs as unbundled elements," while other carriers entering the market would not be barred, and the court therefore emphasized that "if history showed that lack of access to EELs had not impaired CLECs in the past, that would be evidence that similarly situated firms would be equally unimpaired going forward." *Id.*

Competing carriers' own conduct demonstrates that they are capable of providing (and are in fact providing) high-capacity services without access to EELs as UNEs, and the fact that special access may be priced higher than UNEs is irrelevant, because "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate." *Id.* at 576. As the Supreme Court made clear in *Iowa Utilities Board*, the impairment standard is not satisfied simply because unbundled access would permit competitors to reduce their costs and earn higher profits. *See* 525 U.S. at 390.

First, as demonstrated above, competing carriers are extensively using special access to provide high-capacity services, and this includes loop-transport combinations that they purchase in the form of special access. Of the high-capacity circuits that competing carriers purchase from Verizon, nearly 93 percent of the DS1 loops and more than 99 percent of the DS3 loops are purchased as special access service, while only 7 percent of the DS1 loops and less than 1 percent of the DS3 loops are purchased as UNEs. *See* Verses/Lataille/Jordan/Reney Decl. ¶¶ 53-55. With respect to EELs specifically, 94 percent of DS1 loop and transport combinations are purchased as special access rather than EELs. *See id.* ¶¶ 57-59. And it is not only the major

carriers that rely on special access as opposed to UNEs — even when AT&T, MCI, and Sprint are removed from the totals, competing carriers are purchasing 90 percent of DS1 loop and transport combinations from Verizon as special access rather than EELs. *See id.*, Exh. 10A.

Second, even those carriers who have purchased EELs first served customers for extended periods of time using special access before converting to EELs. One of Verizon's largest purchasers of special access services has waited an average of nearly two years, and in some cases more than seven years, to convert its special access circuits to UNEs. *See id.* ¶ 59. A number of carriers that use special access services extensively have not converted any special access circuits to UNEs or have converted only a small fraction. For example, this same carrier has converted only a small fraction (1/30) of its special access circuits to EELs; another of Verizon's largest purchasers of special access services has not converted any of its circuits to EELs, nor have several other CLECs that use special access extensively. *See id.*

In sum, the evidence shows that competing carriers are able to compete successfully without access to individual high-capacity UNEs in general, and without access to combinations of those elements in the form of EELs, and there is accordingly no basis to permit competing carriers to convert their current special access arrangements to EELs. These same facts establish that there is no basis for requiring access to EELs generally.

Eligibility Criteria. Nonetheless, if the Commission retains an unbundling obligation for high-capacity UNEs under any circumstances, including either individual elements or combinations in the form of EELs, it also must revisit its current eligibility criteria for the use of those elements. First, the Commission cannot permit carriers to convert pre-existing special access circuits that they are already using to provide service. By definition, a "conversion" can occur only if the requesting carrier is *already* using special access to provide the services that it

seeks to offer; otherwise, there would be nothing to convert. In that circumstance, the carrier plainly does not require the lower rates in order to offer those services. *See USTA II*, 359 F.3d at 593 ("CLECs hitherto relying on special access" are "barred from access to EELs as unbundled elements" because "history show[s] that lack of access to EELs had not impaired [those] CLECs"). The sole effect of the price break is thus to increase the other carrier's profits, which the Supreme Court found could not be the basis for an impairment finding. *See Iowa Utils. Bd.*, 525 U.S. at 389-90.

Second, the fact that some competing carriers are competing successfully with special access suggests that other carriers can compete in the same manner and do not need access to individual high-capacity UNEs or EELs. As the D.C. Circuit held in its discussion of the eligibility criteria, "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that CLECs are 'impaired' by lack of access to the element" as a UNE. *USTA II*, 359 F.3d at 593. Thus, even if the Commission determines that individual high-capacity UNEs or EELs should be made available under certain circumstances, it must limit their use to the specific services for which it finds impairment. And, as described above, this means prohibiting their use in connection with long-distance, wireless, and packet-switched broadband services, where there is intense competition that has emerged without competing carriers relying on individual high-capacity UNEs or EELs.

Third, the Commission's current eligibility criteria do not accomplish the objectives described above and should be revisited, particularly in light of *USTA II* and the new evidence submitted here. In particular, the Commission's criteria do not prevent competitors from using individual high-capacity UNEs or EELs to provide the very services they have been providing

for years without such unbundled access – *i.e.*, in competitive markets in which there is no finding of impairment. To be sure, the Commission states that a carrier is allowed access to an EEL only if it is a "bona fide provider[] of . . . local voice service." *Triennial Review Order* ¶ 595. But the criteria the Commission adopted to enforce that so-called limitation focus not on whether a particular facility *is in fact* used for local service, but rather on whether it *could in theory* be used for that purpose. *See id.* ¶¶ 602-611. Indeed, of the six criteria listed in the *Triennial Review Order*, the only one that even purports to require that the EEL be used for local service — the requirement that the requesting carrier maintain "active" interconnection trunks for the exchange of local voice traffic, *id.* ¶ 607 — specifically permits the tail to wag the dog. As the FCC made clear, this requirement establishes only a "24-to-1 EEL to interconnection trunk ratio." *Id.* ¶ 608. That ratio means that, rather than being used predominantly for local service, individual EELs could carry *no* local traffic, and the amount of local traffic on the entire interconnection trunk could be minimal.[85] The *Triennial Review Order* thus places the Commission squarely where the D.C. Circuit said it could not go. It broadly permits competing carriers to use individual high-capacity UNEs or EELs to provide special access, with *no*

[85] The remaining eligibility requirements by their terms have no bearing on whether a particular combined facility is used to provide local or non-local service. The first three – state certification, local number assignment, and an E911 record, *see Triennial Review Order* ¶¶ 601-602 – establish only that a competitor *could* use the EEL to provide local service, not that it actually does so. The next requirement – that the EEL terminate to a collocation arrangement, *see id.* ¶ 604 – is largely irrelevant to the major long-distance incumbents, which purchase the bulk of the nation's special access (and thus stand to gain the most from the new rules) and which already have nearly ubiquitous collocation arrangements. *See* Ex Parte Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, Attach. at 7, CC Docket Nos. 01-338, *et al.* (Jan. 30, 2003). And the final requirement – that the facility be served by a switch that could *in theory* provide local service, *see Triennial Review Order* ¶ 610 – by its terms says nothing about how the facility is actually used, and, of course, CLECs already have deployed thousands of circuit and packet switches that satisfy this standard.

practical limitation on the extent to which they can do so.[86] And it does this in the absence of any finding that competing carriers are impaired in their ability to provide non-local services without access to UNEs.[87]

d. Entrance Facilities

The Commission has recognized that entrance facilities are particularly well suited to competitive supply, because they "often represent[] the point of greatest aggregation of traffic in a competing carrier's network, and such carriers are more likely to self-deploy these facilities because of the cost savings such aggregation permits." *Triennial Review Order* ¶ 367. The Commission also found that entrance facilities are "the most competitive type of transport," and competitive deployment of these links is "pervasive." *Id.* ¶ 367 n.1122.[88]

Verizon's data confirm these findings. These data show that competing providers have been steadily replacing entrance facilities they have obtained from Verizon with their own

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[86] The Commission also abandoned its "commingling" bar, which both the FCC and the D.C. Circuit stated is necessary "to prevent carriers from using [EELs] 'solely or primarily to bypass special access services.'" *CompTel*, 309 F.3d at 17 (quoting *Supplemental Order Clarification* ¶ 28).

[87] The Commission suggested that its new requirements are "based largely on . . . solutions advanced by" certain of the incumbent LECs. *Triennial Review Order* ¶ 596. Although the criteria proposed by the ILECs did include *some* of the requirements articulated by the FCC, they also contained important *additional* requirements that would have meaningfully limited the ability of competing carriers to use EELs to displace special access service. The Commission rejected these additional requirements, thus eliminating the effectiveness of the new rules.

[88] In the *Triennial Review Order*, the Commission concluded that the dedicated transport UNE should include "only those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches." *Id.* ¶¶ 365-366. The D.C. Circuit, on review, found "the record too obscure to make any final ruling" on the Commission's treatment of entrance facilities, and "simply remand[ed] the matter for further consideration." *USTA II*, 359 F.3d at 586. The court expressly noted that, on remand, the Commission remained free to find that, however entrance facilities are classified, CLECs are not impaired without access to such facilities as UNEs. *See id.*

competitive transport. From the beginning of 2003 through the middle of 2004, competing providers have performed such migrations for more than 32,000 entrance-facility circuits. *See* Declaration of Mohit Patel ¶ 15 ("Patel Decl.") (Attachment F). Verizon's data also show that, to the extent that competing providers continue to obtain entrance facilities from Verizon, they typically purchase special access rather than UNEs. Of the high-capacity entrance-facility circuits that carriers purchase from Verizon, approximately 97 percent are special access, while only 3 percent are UNEs. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 56 & Exh. 13; Patel Decl. ¶ 16.

Finally, entrance facilities are not part of Verizon's legacy network, *see Triennial Review Order* ¶ 366, and therefore competing carriers have the same ability as Verizon to deploy such facilities. When a competitive carrier orders an entrance facility from Verizon, Verizon must design, engineer, and construct that facility to order. *See* Patel Decl. ¶ 6. Once the facility is constructed, it is dedicated to the use of the carrier that ordered it, and is not used by Verizon to provide service to its own end users. *See id.* ¶ 9. As the Commission previously concluded, ILECs and CLECs stand on equal footing in deploying high-capacity facilities to locations not previously served. *See Triennial Review Order* ¶ 275 (with respect to new fiber deployment, "the entry barriers appear to be largely the same for both incumbent and competitive LECs"); *see also id.* ¶ 367 ("Competing carriers have control over where to locate their network facilities to minimize self-deployment costs, or the costs of using third-party alternatives for transport from the incumbent LEC's network."). Moreover, it is well settled that incumbent LECs cannot be required to build new transmission facilities for the purpose of providing those facilities on an unbundled basis to competing carriers. *See Iowa Utils. Bd. v. FCC*, 120 F.3d at 813; *Triennial Review Order* ¶¶ 630, 645.

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2. *Second*, the Commission must eliminate unbundling of high-capacity UNEs in those wire centers that have concentrated demand for high-capacity services, and that also are particularly likely to attract competitive entry. Verizon's data show that these conditions are met for wire centers with 5,000 or more total *business* lines (retail plus wholesale), and for wire centers in which business lines account for 30 percent or more of the total lines in those wire centers.

In Verizon's region, there are a total of roughly 950 wire centers that contain 5,000 or more business lines — about 15 percent of Verizon's total wire centers with special access revenues. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 63 & Exh. 16. Competing carriers have deployed fiber in more than half of such wire centers, as determined by inspections of fiber-based collocation plus independent data provided by GeoTel. *See id.*[89] Approximately three-quarters of the high-capacity special revenues that are generated in wire centers with 5,000 or more business lines are generated in wire centers with competitive fiber. *See id.* Wire centers meeting this criterion also have attracted extensive competition from competitors using special access. For example, nearly all (99.9 percent) of the wire centers with 5,000 or more business lines contain one or more competitors that use Verizon special access service. *See id.* ¶ 64.

There are a total of 1,035 Verizon wire centers in which business lines account for 30 percent or more of the total lines in the wire center — a little more than 16.5 percent of Verizon's roughly 6,300 wire centers with high-capacity special access revenues. *See id.* ¶ 65 & Exh. 17. More than a third of these wire centers have attracted competitive fiber. *See id.* Moreover, approximately three-quarters of the high-capacity special access revenues that are

[89] Based solely on fiber-based collocation, the Bell companies as a whole report that 53 percent of their wire centers with 5,000 or more business lines now have fiber-based collocation. *See 2004 Fact Report* at III-28 to III-29 & Table 17.

generated in wire centers where business lines account for 30 percent or more of total lines are generated in wire centers with competitive fiber. *See id.* Wire centers meeting this criterion have likewise attracted extensive competition from competitors using special access. For example, more than 94 percent of the wire centers in which business lines account for 30 percent or more of the total contain one or more competitors that use Verizon special access service. *See id.* ¶ 66.

3. *Finally*, the Commission must eliminate unbundling of high-capacity UNEs in any Metropolitan Statistical Area in which a significant portion of the MSA has already attracted competitive facilities and in which competing carriers demonstrably are able to supplement their facilities and successfully serve customers using special access. There are at least two easy-to-administer approaches for the Commission to identify such MSAs.

First, the Commission should eliminate unbundling of high-capacity UNEs in any MSAs in which Verizon has already qualified for any degree of special access pricing flexibility, and in which competing carriers are using special access service to serve end-user customers. This follows from the fact that the test for pricing flexibility is more stringent than the test for impairment. In the pricing flexibility context, the Commission has formulated a test to determine where competitors already "have made irreversible, sunk investments." *Pricing Flexibility Order* ¶ 24. The relevant inquiry with respect to impairment, by contrast, is whether competition is "possible," regardless of whether competitive facilities have already been deployed. Moreover, in the impairment inquiry, it is necessary for the Commission to take into account the fact that competing carriers can use the incumbent LEC's special access, which does not factor into the pricing flexibility inquiry where the inquiry is whether special access itself is sufficiently competitive to warrant relief from rate regulation. By definition, in any MSA where a Bell

company has been granted pricing flexibility, the ILEC's special access service is constrained by competitive forces, and can therefore be used by a competing carrier in addition to or in place of its own or other alternative high-capacity facilities. And, in addition, the fact that competing carriers are using special access services successfully to serve end-user customers demonstrates that they are able to do so in that MSA, even where they do not have facilities of their own.

Second, the Commission should also eliminate unbundling of high-capacity UNEs in any MSA in which at least half of the DS1 loops served by the incumbent LEC in that MSA are in wire centers where competing carriers have deployed fiber, and where competing carriers in those wire centers have high-capacity connections to end-user customers either over their own or other competitive fiber or though special access service obtained from ILECs.

Consistent with the pricing flexibility test, this approach would enable the Commission to make an MSA-wide finding where there is actual competition for the high-capacity business of end-user customers in a significant percentage of wire centers within that MSA (in this case, at least 50 percent). *See Pricing Flexibility Order* ¶ 72 (finding that MSA-based analysis "best reflect[s] the scope of competitive entry, and [is] therefore a logical basis for measuring the extent of competition" for high-capacity services).[90] Although this threshold is lower than what

[90] This could be addressed using the same procedures the Commission has used in the *Pricing Flexibility* context. Incumbent LECs would submit evidence of the existence of fiber in its wire centers based on the existence of fiber-based collocation in a wire center (evidence the Commission previously endorsed in the *Pricing Flexibility Order* for a similar purpose), or through more direct evidence of CLEC fiber deployment such as the independent sources Verizon used to develop the extensive maps attached to this filing. Competing carriers that the ILEC identifies as having fiber would be given the opportunity to rebut the ILEC's showing within 30 days. The Wireline Competition Bureau would then have 90 days to act on the petition, and if the Bureau chose not to act within that time frame the petition would be deemed granted and there would be no further unbundling required within the MSA at issue. An incumbent LEC would also be permitted to petition for unbundling relief with respect to any geographic areas that are not located within an MSA using these same processes.